IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-521

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*

BRIEF OF *AMICUS CURIAE*, AUTOMOBILE IMPORTERS OF AMERICA, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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INTEREST OF *AMICUS CURIAE*, AUTOMOBILE IMPORTERS OF AMERICA, INC.

Automobile Importers of America, Inc. (AIA) is a trade association organized as a non-profit District of Columbia corporation. Its Members import into,[1] or manufacture

[1] Alfa Romeo, Inc.
BMW of North America, Inc.
[footnote continued]

for export to,[2] the United States the following makes of vehicles: Alfa Romeo, Arrow, BMW, Bentley, Challenger, Colt, Courier, Datsun, FIAT, Honda, Jaguar, Lancia, Lotus, LUV, MG, Mazda, Opel, Peugeot, Renault, Rolls-Royce, SAAB, Sapporo, Subaru, Toyota, Triumph and Volvo. The sales volumes of these vehicles range from the highest among imports to those too low to be listed among the top twenty-seven imports.[3] Associate Members[4] of AIA are manufacturers of parts for imported and domestic

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British Leyland Motors Inc.
Citroen Cars Corporation
FIAT Motors of North America, Inc.
American Honda Motor Co., Inc.
Mazda Motors of America, Inc.
Nissan Motor Corporation in U.S.A.
Peugeot Motors of America, Inc.
Renault USA, Inc.
Rolls-Royce Motors, Inc.
SAAB-SCANIA of America, Inc.
Subaru of America, Inc.
Toyota Motor Sales, U.S.A., Inc.
Volvo of America Corporation

Except for Subaru of America, Inc., these companies are wholly owned subsidiaries of the manufacturers of the vehicles they import.

[2] Isuzu Motors Limited
Lotus Cars Limited
Mitsubishi Motors Corporation

[3] Automotive News, 1977 Market Data Book Issue, p. 70

[4] Bridgestone Tire Company of America, Inc.
CEAT Representative Office, Inc.
Lucas Industries Inc
Michelin Tire Corporation
Pirelli Tire Corporation
Semperit of America, Inc.
Toyo Tire (U.S.A.) Corporation
Yokohama Rubber Co., Ltd.

motor vehicles whose products run the full range of parts from the smallest light bulb to tires.

All AIA Members and Associate Members are subject to the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. §§1391-1431) (Safety Act), and regulations promulgated thereunder by the National Highway Traffic Safety Administration (NHTSA). The Safety Act defines "manufacturer" as including importers (15 U.S.C. §1391(5)). While AIA Members and Associate Members are subject to the same provisions under which NHTSA has proceeded against Petitioner General Motors Corporation (GM), the risk of the now $800,000[5] penalty is of much greater significance to them. Their respective shares of the market are far smaller than that of GM, and the threatened penalty is therefore far larger on a per unit basis.[6]

Although neither AIA nor any of its individual members has participated in the prior proceeding in this case, even as an *amicus curiae*, we have closely followed the case because of its benchmark nature as the first fully developed alleged safety-related defect case. As such, the case had the potential of providing guidance for pending and future cases.

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[5] The maximum penalty was increased from $400,000 to $800,000 by Pub. L. 93-492, 88 Stat. 1470. The maximum $800,000 penalty is quickly reached since the penalty accrues at the rate of $1,000 per vehicle or item of equipment involved.

[6] GM's U.S. market share of passenger cars in 1976 was 47.22%, whereas the largest share of an AIA Member was 3.56% (Toyota) and some AIA Members' shares were less than .00013%, the smallest of those reported. Automotive News, 1977 Market Data Book Issue, p. 70.

ARGUMENT

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The questions of the proper definition of "defect" and "motor vehicle safety" under the Safety Act and the judicial procedure for making determinations are of increasing importance as the NHTSA increases its emphasis on defects investigation.

This increase of NHTSA emphasis has been openly proclaimed by the agency to the press. The most recent example is the November 16, 1977 *New York Times* wherein it was reported on page A18:

> An example of the stepped-up Government activity is the increase in the number of cases opened by the Office of Defects Investigation of the National Highway Traffic Safety Administration. In the first nine months of this year, the office opened 23 cases, compared with four in all of 1976.
>
> "I don't know if we're going to get that same high number of units in the future, but I would say you will see probably more recalls in the future," said Lynn J. Bradford, director of the Office of Defects Investigation. "The issue here is that there will definitely be more activity in the investigation of defects."
>
> Mr. Bradford, who is 49 years old, was appointed to his post June 25, replacing Andrew Detrick, who had been head of the office for the previous five years.
>
> PANEL OF ATTORNEYS NAMED
>
> Another sign of increased activity in vehicle safety was the recent appointment by Joan Claybrook, head of the Federal traffic safety agency, of a panel of lawyers to serve as consultants for a year, reviewing the backlog of defects investigations.
>
> Stuart, *Number of Recalled Vehicles Nears 8-Million Mark,* N.Y. Times, November 16, 1977, at A18, col. 1

This is the view not only of NHTSA and the *New York Times* writer, but of others, as again reported by the *New York Times:*

> Clarence M. Ditlow 3d, head of the Washington-based Center for Auto Safety, said that, based on his study of the moves inside the highway traffic safety agency, both the number of recalls and units involved would be high for several more years.
>
> *ibid.*

As a part of NHTSA's increasing emphasis on defects investigations, AIA companies have perceived an ever expanding NHTSA view of what constitutes a "safety-related defect." It therefore appears inevitable that at some point there will have to be developed judicially stated limits on the scope of safety-related defects. That process was occurring on a slow, case-by-case basis (*e.g., General Motors Corp. v. United States,* ___ F.2d ___ (D.C. Cir. 1977, Dkt. No. 76-1744 and 76-1745; *United States v. Ford Motor Co.,* ___ F.2d ___ (D.C. Cir. 1976, Dkt. No. 76-0029); *United States v. General Motors Corp.,* 518 F.2d 420 (D.C. Cir. 1975); *Ford Motor Co. v. Coleman,* 402 F. Supp. 475 (D.D.C. 1975), *aff'd,* 425 U.S. 927 (1976)), until the majority's *per curiam* opinion in the court below in this case. That opinion, through its very lack of standards or definition, has not only clouded the little progress towards judicially stated standards, but it also encourages the expansive tendency of NHTSA.

It would be in the public interest to resolve sooner rather than later the scope of safety-related defects. This would permit the industry to make more promptly its own determinations[7] of when recall campaigns are appropriate. By so doing, remedies for true safety-related defects can be instituted at the earliest time to the clear benefit of the public without the wasteful expense of unnecessary recall campaigns. Whatever expense is involved in either defending NHTSA's orders for unnecessary recall campaigns or in conducting them must eventually be passed on to the consumers.

This case provides the Court with a unique opportunity to rationalize the safety-related defect issues. Not only would the Court be superseding the erroneous *per curiam* decision which both sets no standards and implicitly destroys the prior limited standards through its *per se* rule, but the Court would also have before it the record of the only trial to have taken place concerning an alleged safety-related defect.

II. The greatest singular failing of the decision below is its *per curiam* nature. It simply provides no positive guidance for the agency, the industry, or the District Courts in pending and future cases. Instead, it establishes what GM characterizes as a *per se* rule and what Judge Leventhal characterizes as a "conclusive presumption" commenting:

> The majority elevates facts which give rise to a strong suspicion of dangerousness into a conclusive presumption of the existence of a safety-related

[7] The vast majority of recall campaigns are conducted upon the manufacturers' initiative, pursuant to 15 U.S.C. §1411, rather than by NHTSA order, pursuant to 15 U.S.C. §1412.

> defect. I would allow the manufacturer the opportunity to dispel this justified apprehension by proof that failure due to the defect does not occur in a dangerous fashion and that the risk arising from the defect is therefore inconsequential.
>
> Appendix A to GM's Petition, p. 34a.

Although we have two lengthy and reasoned opinions to tell us what the law is *not* (the District Court opinion reversed *per curiam* and the dissent on appeal), we have nothing to indicate what the law *is*. The majority statement that it "agrees with much of Judge Leventhal's scholarly [dissenting] opinion" (Appendix A to GM's Petition, p. 2a) is of no help since we are not told with what the majority agreed (and what is therefore of precedential value) and with what it disagreed (and what is therefore of no precedential value). We are simply left with little guidance.

The best that can be said for the precedential value of the *per curiam* opinion is that it finds no definition of "motor vehicle safety" is required nor is a trial required in this case because the failures occurred while the vehicle was being driven (apparently no matter how slowly) and caused the driver to lose control of the vehicle (apparently no matter for how small a split second). We submit that the appellate majority fell prey to a simplistic and alarmist lay view that certain vehicle systems, here the steering system, are so critical to motor vehicle safety that anything less than perfect operation of such systems is *per se* an unreasonable risk of the accidents, death or injury. Judges Leventhal and Gasch, we believe, more soberly considered the matter one for systematic judicial consideration, including a trial where all the evidence can be considered.

III. On at least one issue, whether GM was entitled to trial, the four judges clearly split 2-2. Judges Gasch (the District Court judge) and Leventhal (the dissenting appellate judge) would permit GM an opportunity for examination of the evidence in a judicial setting whereas the two-judge appellate majority would deny that opportunity. This issue is especially important because it ultimately affects the question of whether there will ever be a due process proceeding on defect matters.

The NHTSA proceeding is not a due process hearing by statutory design. Whether or not by coincidence, it has worked out that in every case where NHTSA has made an initial determination of the existence of a safety-related defect followed by an agency "hearing" to afford the manufacturer an opportunity to present data, views and arguments, the final order thereafter issued by NHTSA[8] has not varied in any material respect from the initial determination. Not surprisingly, manufacturers have come to regard the agency proceeding, with its absence of any independent hearing officer or the right of cross-examination, as a formality to be observed on the way to the courthouse. The statutory scheme was intended to provide a trial *de novo*[9] where, for the first time, the manufacturer would be given a "due process" opportunity to establish its case. The *per curiam* decision offers no explanation on how the District Court can discharge its

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[8]This procedure was formerly set forth in 15 U.S.C. §1402, but is now found in substantially the same form in 15 U.S.C. §1412, as a result of the October 27, 1974 Amendments, Pub. L. 93-492, 88 Stat. 1470.

[9]H.R. Rep. No. 93-1191, 93rd Cong. 2d Sess. 17 (1974); *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 480 (D.D.C. 1975), *aff'd*, 425 U.S. 927 (1976).

trial *de novo* responsibilities in the face of the new *per se* rule.

This case would impose two new burdens for consideration by manufacturers interested in exercising their constitutional right to a due process hearing. First, to develop its entire case at the agency level, even knowing the virtually certain adverse outcome, in order to build a citable record when facing a motion for summary judgment in District Court.[10] This vain and useless act does nothing but increase the expense and aggravation of defending questionable NHTSA defect orders.

Second, by establishing an irrebuttable presumption in cases involving certain (unspecified) vehicle systems, the court below would make useless the preliminary injunction procedure cited in *Ford Motor Co. v. Coleman, supra,* to toll the assessment of the $800,000 penalty during the pendency of the litigation of the alleged safety-related defect. This issue is well discussed on pp. 16-18 of GM's Petition and need not be repeated here. Note, however, that while for the giants, GM and Ford, $800,000 may be the "fair price of adventure" (*Ford Motor Co. v. Coleman,* 402 F. Supp. at 489), *i.e.,* the penalty risk over and above the cost of the recall campaign and litigation costs if the safety-related defect case lost, for the smaller companies it is a significant barrier.[11] In the eleven-year

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[10]The agency's motion for summary judgment which the two-judge appellate majority would grant was based solely on its administrative record. Appendix D to GM Petition, p. 40a.

[11]By smaller companies, we mean substantially smaller than GM and Ford by any standard, including total assets, net capital, total sales in dollars or motor vehicle sales in units. Smaller companies include not only AIA companies but domestic companies like Checker, Excalibur, Avanti, and a host of truck manufacturers as well as parts manufacturers.

history of the Safety Act, only GM and Ford have dared seek to litigate alleged safety-related defect cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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